

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NEALE COLE)	
Claimant)	
VS.)	
)	Docket No. 1,024,223
GREAT PLAINS MANUFACTURING, INC.)	
Respondent)	
AND)	
)	
SENTRY INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appeals the June 7, 2007 Penalties Hearing Order of Administrative Law Judge Bruce E. Moore. Claimant's application for penalties and post-award attorney fees was denied after the Administrative Law Judge (ALJ) found nothing in the record established that the medical bills in issue were reasonable or necessary.

Claimant appeared by his attorney, John M. Ostrowski of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Brenden W. Webb of Overland Park, Kansas.

The Board adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Deposition of Neale Cole taken on October 18, 2005; the transcript of the Preliminary Hearing taken on May 2, 2006, with exhibits; and the documents of record filed in this matter.

ISSUE

Is claimant entitled to payment of medical bills from visits to the Russell Regional Hospital emergency room on June 1, 2006, and June 20, 2006? Claimant argues those medical bills were stipulated as being authorized medical expenses in the Agreed Award of October 31, 2006. Respondent argues these bills were incurred without respondent's knowledge or agreement and were unauthorized. Therefore, they were not part of the authorized medical treatment contemplated by the Agreed Award.

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the Penalties Hearing Order should be reversed with regard to the ALJ's denial of an Order for payment of medical bills and an assessment of penalties for respondent's refusal to pay those medical bills, and remanded to the ALJ for a determination of the appropriate amount of post-award attorney fees.

Claimant suffered accidental injury arising out of and in the course of his employment with respondent on July 6, 2005. The parties entered into an Agreed Award on October 31, 2006, which stated in part:

10. Medical treatment has been furnished in the amount of \$18,259.98. **None of the medical to date has been unauthorized.**

It is believed that all valid authorized medical has been paid, and it is the intent of the parties that all valid authorized medical be paid through the date of the Agreed Award.¹ (Emphasis added.)

At the preliminary hearing held on May 2, 2006, claimant was chastised by the ALJ regarding unauthorized trips to the emergency room for the purpose of obtaining pain medication. Nevertheless, claimant went to the Russell Regional Hospital emergency room on June 1 and June 20, 2006. Both visits were unauthorized. Elizabeth Guldán, the senior claims representative from Sentry Claims Service (respondent's workers compensation provider in this matter), sent a letter dated September 19, 2006, to Russell Regional Hospital advising the bills in question were unauthorized and should be forwarded to claimant or his health insurance carrier.

The Agreed Award, entered only 43 days later, makes no mention of the Russell Regional Hospital bills. The agreement merely states that "none of the medical to date has been unauthorized".²

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

¹ Agreed Award at 2.

² *Id.*

³ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.⁵

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount . . . for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill . . .⁶

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.⁷

The purpose of the attorney fee statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which a fee could be taken.⁸

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2005 Supp. 44-510k.

⁶ K.S.A. 44-512a(a).

⁷ K.S.A. 44-536(g).

⁸ *Robinson v. Golden Plains Health Care*, No. 239,485, 2004 WL 2522324 (Kan. WCAB Oct. 25, 2004).

award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.⁹

The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.¹⁰

Respondent and its insurance company were aware of the existence of the emergency room bills no later than September 19, 2006, when the letter was sent from Elizabeth Guldán to Russell Regional Hospital. The language of the Agreed Award signed 43 days later is clear. In the Agreed Award, it states "[n]one of the medical to date has been unauthorized." The parties are bound by the terms of their agreement. While respondent may try to argue exclusion of the emergency room bills, nothing in the Agreed Award accomplishes this. In fact, to the contrary, the fact respondent's representative was aware of the bills supports claimant's contention that the bills were to be included in the terms of the later created agreement.

A penalty of 10 percent of the past due medical bills is appropriate. As the bills are in the amount of \$407.50 and \$404.50, the appropriate penalties shall be \$40.75 and \$40.45 respectively.

K.S.A. 44-536(g) allows for post-award attorney fees in connection with a hearing for penalties. However, K.S.A. 44-555c only allows for Board review of administrative law judge decisions on appeal. The Board does not have original jurisdiction on issues, but is limited to review of decisions already rendered. Here, the ALJ has not ruled on claimant's attorney fee request. Also, claimant's counsel has incurred additional time pursuing this appeal. Therefore, the matter should be remanded to the ALJ for a determination of the appropriate amount of fees to be awarded.

CONCLUSIONS

The Agreed Award wherein respondent was to pay all authorized medical benefits includes the emergency room bills to Russell Regional Hospital. Respondent shall pay penalties of \$81.20, which is 10 percent of the past due medical bills. The matter is

⁹ Timothy J. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

¹⁰ *Anderson v. Dillard's Inc.*, 283 Kan. 432, 436, 153 P.3d 550 (2007), citing *Liggatt v. Employers Mut. Casualty Co.*, 273 Kan. 915, 921, 46 P.3d 1120 (2002).

remanded to the ALJ for a determination of the appropriate amount of attorney fees to be assessed.

DECISION

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Penalties Hearing Order of Administrative Law Judge Bruce E. Moore dated June 7, 2007, should be, and is hereby, reversed with regard to the award for the payment of the emergency room bills from Russell Regional Hospital and the award of penalties, and is remanded to the ALJ for a determination of the appropriate amount of attorney fees to be assessed in this matter.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge